

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JOHN DOE,	.
	.
Plaintiff,	.
	. Case No. 21-cv-20706
vs.	.
	. Newark, New Jersey
BAILE SEBROW,	. January 26, 2023
	.
Defendant.	.
	.

TRANSCRIPT OF HEARING
(Revised; errata sheet attached)
BEFORE THE HONORABLE EDWARD S. KIEL
UNITED STATES MAGISTRATE JUDGE

This transcript has been reviewed and revised in accordance with L. Civ. R. 52.1.

APPEARANCES (the parties appeared in person):

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Proceedings recorded by electronic sound recording (not all parties were discernible on the record); transcript produced by transcription service.

1 (Commencement of proceedings)

2

3 THE COURT: All right. We're on the record in the
4 matter of Doe versus Sebrow, Case 21-cv-20706.

5 If I could have the appearance on behalf of
6 plaintiff, please.

7 MR. SZALKIEWICZ: Daniel Szalkiewicz, Daniel
8 Szalkiewicz & Associates, 23 West 73rd Street, Suite 102, New
9 York, New York 10023, for the plaintiff John Doe, who is to
10 my left.

11 Good afternoon, Your Honor.

12 THE COURT: Good afternoon.

13 And how about on behalf of defendants?

14 MR. HELLER: Yes, good afternoon, Your Honor. Ira
15 Heller representing Baile Sebrow, who is present to my right.

16 THE COURT: All right. Please be seated.

17 There's a lot of things pending in the case, and I
18 want to keep my arm around it and see what's happening and
19 just to confirm things.

20 There is a motion to dismiss that was filed on
21 October 21st, 2022. And I don't think there's an opposition
22 to it.

23 MR. HELLER: It will be filed this week,
24 Your Honor.

25 THE COURT: How are you going to file it this week?

1 It's -- you're out of time. Did you make an application to
2 anybody to file it out of time?

3 It was filed in October. Correct?

4 Did you make an application to file it out of time?

5 MR. HELLER: No, I did not, Your Honor.

6 THE COURT: Okay. If you file it without leave of
7 Court, it's going to be stricken. I'll tell you -- so can
8 you file it, if you like, but at this point, it's considered
9 unopposed. Right?

10 Hold on one second.

11 I believe we discussed that last time, didn't we?

12 MR. HELLER: Specifically with regard to --

13 (Simultaneous conversation)

14 THE COURT: -- regard to the motion to dismiss.

15 There is also a motion to strike that was filed on
16 December 27th, 2022, to strike the defendant's answer.

17 That motion is returnable February 6th, I believe.
18 And your opposition was due -- I believe this past Monday.

19 What are you going to do about that?

20 MR. HELLER: I'm going to have to ask leave of the
21 Court -- Judge.

22 THE COURT: Do the schedules not matter to you,
23 Mr. Heller? I don't know what to do about it. I mean, I
24 know if -- but every time that we have something scheduled or
25 a motion is filed, discovery is served on you, nothing

1 happens.

2 MR. HELLER: As far as the discovery, Judge, that
3 has been provided. I did receive a letter about
4 deficiencies. I responded to that letter.

5 As far as Your Honor's order that I serve the
6 notice upon my client, that was served.

7 I did get the transcript of the last proceeding, as
8 Your Honor ordered. That -- yesterday. I have it with me.
9 I can present my client -- I know Your Honor wanted me to
10 send it to her with proof of service. It's enough that I
11 hand it to her in court before Your Honor, then I will do it.
12 Otherwise, I will follow the procedure --

13 As far as the others, I do have a -- my own motion
14 in preparation to dismiss for reasons that I will outline to
15 the judge --

16 And as far as the --

17 THE COURT: That hasn't been filed yet. Right?

18 MR. HELLER: No, it has -- it will be filed this
19 week. It will be --

20 THE COURT: You have filed a letter -- I think --
21 or actually not filed a letter but sent me a letter in
22 response to my request for a settlement memo back on
23 December 16th. And in that letter -- and I am not giving
24 away any secrets in the letter -- I presume that you already
25 talked to plaintiff's counsel about this -- and you were

1 going to seek to file a motion to dismiss.

2 What's the basis for that motion to dismiss? Under
3 what rule?

4 MR. HELLER: I really don't have my research in
5 front of me, Judge.

6 THE COURT: No, well, that's -- I mean, what's the
7 basis of that?

8 MR. HELLER: I am not prepared to argue it,
9 Judge --

10 (Simultaneous conversation)

11 THE COURT: Well, I want to understand what the
12 basis for it, just in a broad perspective, because I don't
13 want to waste anybody's time, including the Court's time,
14 because if it's an argument that there's no basis to the
15 complaint, a failure to state a claim -- right? -- under
16 Rule 12(b)(6), that motion has to be made within a certain
17 period of time.

18 And I'm pretty certain that that time is over.

19 So I would ask that you take a look at the rules
20 and what the basis for your motion to dismiss is without --
21 and really take a look at it and see whether it's out of time
22 as well. Okay?

23 MR. HELLER: Yes.

24 THE COURT: Okay. Are you -- waste of time.
25 Right? There may be another reason other than failure to

1 state a claim. There may be a jurisdictional issue that can
2 brought up after the time period requires on these other
3 motions. But generally motions are filed before you file an
4 answer. And I think you filed an answer -- you filed an
5 answer on October 3rd. Once you file an answer, there are
6 certain defenses or motions, pretrial motions that are made.

7 Okay?

8 Let me ask about the status of discovery from
9 plaintiff's counsel.

10 Mr. Heller just told me that he's up to date on
11 discovery?

12 MR. SZALKIEWICZ: Your Honor, on January 10th --
13 January 5th, we received counsel's responses to our
14 interrogatory requests and document demands. One, the
15 interrogatories themselves are not verified. And, two, there
16 weren't -- documents provided.

17 On January 10th, I sent Mr. Heller a three-page
18 letter detailing each of the deficiencies that we've alleged
19 and also wanting to schedule defendant's deposition.

20 I did not hear a response.

21 On January 24th, I attached a letter; sent it to
22 them again.

23 I did not receive response until 12:42 today.

24 THE COURT: And what is that response? That's
25 regarding depositions? Or?

1 MR. SZALKIEWICZ: It's regarding redline to the --
2 Your Honor, but a redline pretty much to the responses to
3 everything we put in there.

4 But they're not agreeing to any ESI protocol --
5 even though they're alleging that certain --

6 (Simultaneous conversation)

7 THE COURT: The ESI protocol? This case is all
8 about ESI, isn't it? Or it's all about emails and those
9 things.

10 Mr. Heller?

11 Are you engaged in discovery over email -- on
12 Internet without an ESI protocol? You just wing it?

13 Sir?

14 MR. HELLER: Judge, I will look into it. I am not
15 even sure how to -- but I will --

16 MR. SZALKIEWICZ: And -- Your Honor. We put what
17 we believed to be the discovery. And the basis of -- is
18 that -- the defendants -- apparently, counsel or her --
19 client is alleging that she -- somehow spoofed or --

20 So without any further --

21 THE COURT: Well, if there's an allegation of
22 spoofing I imagine you have to look at the metadata and
23 download -- I would imagine that's --

24 MR. SZALKIEWICZ: I agree, Your Honor. My client's
25 had his -- I -- actually -- extracted the messages from the

1 phone. We've turn them over already to counsel --

2 (Simultaneous conversation)

3 MR. HELLER: -- response to that, Mr. Szalkiewicz
4 was -- expert testimony in the proceeding that's currently
5 going on right now in New Jersey and will be -- actually
6 within two weeks will be back -- on this.

7 I have not had an opportunity to cross-examine
8 Mr. Szalkiewicz as to the procedures that he's used. He's
9 just about finishing his testimony.

10 I also have my client's device in for forensic
11 examination. It is not complete yet; so I don't have that at
12 this time.

13 There are really two simultaneous proceedings going
14 on, and, really, the other one, which long preceded this,
15 should be completed first, Judge.

16 THE COURT: Well --

17 MR. SZALKIEWICZ: Your Honor --

18 THE COURT: -- what does that mean to me? I
19 don't -- I don't know anything about the other case --

20 (Simultaneous conversation)

21 MR. HELLER: -- response he's going to get, but --

22 THE COURT: Well, why would you say that --

23 (Simultaneous conversation)

24 THE COURT: Well, what does that -- what does that
25 other case have bearing on this case. There's a discovery

1 order in this case that has to be complied with.

2 MR. HELLER: Same facts and circumstances so --

3 THE COURT: I don't have any application before me
4 that there's something duplicative, that this discovery here
5 should be stayed.

6 You failed to show up at the -- at the conference
7 that we had for -- you remember that? Right? And now we
8 have a scheduling order, and you're required to comply with
9 the scheduling order that's within -- at ECF Number 18. You
10 were supposed to serve discovery requests.

11 Did you serve any discovery requests?

12 MR. HELLER: Not in this matter, Judge.

13 THE COURT: Are you planning to serve any discovery
14 requests?

15 MR. HELLER: Well -- truthfully, my position is
16 that this matter should be dismissed. That is my position.

17 THE COURT: There's no application before me.

18 MR. HELLER: I understand.

19 THE COURT: You haven't filed anything. There's a
20 court order which requires discovery. And it's just fact
21 discovery is supposed to end February 17th.

22 You have an obligation to this Court. I don't care
23 what obligation you have to the state court. Right? You
24 have an obligation to this Court.

25 So you're going to have to work with

1 Mr. Szalkiewicz to get this discovery done. Fact discovery's
2 supposed to be done by February 17th.

3 Mr. Szalkiewicz, any -- any notion that it's going
4 to be done by then?

5 MR. SZALKIEWICZ: I don't believe that we owe
6 anything. So --

7 THE COURT: No. I mean, on the discovery from
8 Mr. Heller to you.

9 MR. SZALKIEWICZ: No. I mean, I haven't got a
10 single document, Judge -- was actually filed and referenced
11 in the --

12 (Simultaneous conversation)

13 THE COURT: -- discovery you want to --

14 (Simultaneous conversation)

15 MR. SZALKIEWICZ: -- a copy of that.

16 A THE COURT: Your discovery, you want to take
17 deposition?

18 MR. SZALKIEWICZ: Yeah, of course, Your Honor.
19 I've noticed him twice already. And we provided five dates
20 where we're available starting January 30th to February --

21 THE COURT: And we're going to schedule it right
22 now.

23 What date do you want to take her deposition?

24 MR. SZALKIEWICZ: Any time next week, Your Honor.
25 I'll cancel whatever --

1 THE COURT: Mr. Heller, what day are you available
2 next week?

3 MR. HELLER: Your Honor, I am completely booked up
4 until the 10th of -- excuse me -- until the 10th of February.

5 THE COURT: You're going to open up a date next
6 week.

7 What dates can you do it? You're going to have a
8 cancel something or rearrange something.

9 MR. HELLER: Judge, I have two domestic violence
10 cases that are very hard to reschedule.

11 I request that I -- to the end of the second week
12 in February.

13 THE COURT: Well, sir, that would certainly be
14 reasonable if you complied with any of the orders in this
15 case or responded to Mr. Szalkiewicz regarding the deposition
16 dates --

17 (Simultaneous conversation)

18 THE COURT: -- you're coming -- now you're coming
19 up to the Court and asking for three weeks -- to take her
20 deposition?

21 That's not going to fly. What day next week can
22 you take the deposition? What date can you move?

23 Mr. Szalkiewicz is going to move things.

24 MR. HELLER: -- the week of the 30th, Judge.

25 THE COURT: Okay.

1 MR. HELLER: Move something on the 31st, the 1st,
2 or the 2nd.

3 THE COURT: All right.

4 What time on the 31st, Mr. Szalkiewicz?

5 What time, Mr. Heller? On the 31st.

6 MR. HELLER: I'm moving what I have on that date,
7 so I'm free --

8 THE COURT: -- the -- deposition will be
9 Court-ordered, January 31st at Mr. Szalkiewicz's office --

10 MR. SZALKIEWICZ: Your Honor, at my co-counsel's
11 office -- co-counsel.

12 THE COURT: Okay. Your co-counsel, that's Mr. --
13 (Simultaneous conversation)

14 MR. HELLER: I have a question, has Mr. Borenstein
15 filed a notice of appearance, because I have not seen one --

16 THE COURT: What does that matter?

17 MR. SZALKIEWICZ: His name's on the complaint, and
18 the -- is listed on the complaint as well.

19 THE COURT: Why does it matter, Mr. Heller?

20 MR. HELLER: I just -- look, Your Honor, you told
21 me that procedure is important, so --

22 THE COURT: It is.

23 MR. HELLER: Yes.

24 THE COURT: Okay. So it's the office -- McConnell.
25 You're going to start that January 31st at 10 A.M.

1 If defendant's counsel or defendant doesn't show
2 up, you can file a letter application for Court-ordered
3 sanctions, and I'll address that.

4 All right.

5 So you're not going to go to the -- as I understand
6 it, Mr. Heller. You're -- and then I ask that counsel, if
7 they have discovery issues, that they confer on it.

8 There is a motion to strike, but as I understand
9 it, there's been a response. So that motion will be denied.
10 But if there's portions of it that are deficient -- as I
11 understand it, you have a deficiency letter that was sent to
12 Mr. Heller; Mr. Heller responded to it. You don't have to
13 make a formal motion on a discovery dispute if you think that
14 it's deficient. Put a joint letter on the docket. Please
15 cooperate in putting a joint letter on the docket. That
16 means that Mr. Szalkiewicz is going to send you his portion
17 of the letter, what he believes is sufficient -- for your --
18 you're going to respond. And that letter can be filed on the
19 docket. Just one letter between the two of you. So please
20 confer.

21 So we'll keep the schedule for February 17th.

22 After this deposition is -- it doesn't sound like a
23 lot of documents, Mr. Szalkiewicz.

24 Is there --

25 MR. SZALKIEWICZ: No, but, I mean, this is the

1 first time we're hearing -- a third-party -- I don't know
2 what they're -- they're going to say.

3 THE COURT: Okay. Well -- whatever and you think
4 it's relevant, make the application.

5 And I hope that counsel confer. If counsel need
6 more time and it's reasonable and the parties, after
7 conferring, have this issue, then put a joint letter on the
8 docket as to each party's position. But I hope the parties
9 can agree, if there is further discovery that needs to be
10 done, both parties agree or both counsel agree to a date and
11 just put that on a joint letter, and I'll so-order it, if
12 there's a further extension of discovery that's needed.

13 MR. SZALKIEWICZ: If -- Your Honor, can I request,
14 Your Honor, is -- discovery order -- the 31st into -- in
15 regards to the of discovery disputes.

16 THE COURT: Yes.

17 MR. SZALKIEWICZ: Could we just have that --

18 THE COURT: Yeah, that'll -- well, we are not -- as
19 to written discovery.

20 But, yeah, January, 31st, I'll choose that date to
21 disputes -- well, why don't I do this right now? I'll put
22 fact discovery to March 30th.

23 Any objection to that, Mr. Szalkiewicz?

24 MR. SZALKIEWICZ: No.

25 THE COURT: Any objection, Mr. Heller?

1 MR. HELLER: No objection.

2 THE COURT: Okay. I'll put it out to March 30th.
3 And any disputes have to be brought to the Court's attention
4 by March 3rd. Again, no formal motions. Please put that in
5 a short letter on the docket.

6 All right.

7 So Mr. Heller, you're going to do what you need to
8 do on those pending motions that you haven't responded to.
9 And then we'll put it out for a follow-up telephone status
10 conference -- let me just get a date on the calendar.

11 Anybody contemplating any experts Mr. Szalkiewicz?

12 MR. SZALKIEWICZ: -- expert --

13 (Simultaneous conversation)

14 MR. HELLER: I may, yeah.

15 THE COURT: All right. We'll talk about experts --
16 at that conference, April 5th, at 10:30 A.M. It'll be by
17 telephone. And the order tell -- give you all the dial-in
18 information.

19 All right. Let's go off the -- sorry.

20 Anything further for defense?

21 MR. HELLER: I guess -- applications that were
22 made --

23 THE COURT: Yeah, I'll take care of those.

24 MR. HELLER: I don't know, Your Honor. We were
25 supposed to be on today for a settlement conference. I don't

1 know if the Court to -- want to --

2 THE COURT: On a settlement conference --

3 MR. HELLER: Okay.

4 THE COURT: Okay.

5 Mr. Szalkiewicz, any further specifics on the
6 record?

7 MR. SZALKIEWICZ: Nothing further, Judge.

8 THE COURT: All right. We're off the record. Let
9 me see counsel.

10 (Conclusion of proceedings)

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|Certification

Certification

I, SARA L. KERN, Transcriptionist, do hereby certify that the 18 pages contained herein constitute a full, true, and accurate transcript from the official electronic recording of the proceedings had in the above-entitled matter; that research was performed on the spelling of proper names and utilizing the information provided, but that in many cases the spellings were educated guesses; that the transcript was prepared by me or under my direction and was done to the best of my skill and ability.

I further certify that I am in no way related to any of the parties hereto nor am I in any way interested in the outcome hereof.

s/ *Sara L. Kern*

10th of February, 2023

Signature of Approved Transcriber

Date

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|Errata

ERRATA

1. Page 10, line : Bornstein changed to Borenstein (by Sara Kern, King Transcription, ^ date)